THE FEDERAL ANTI-TRUST ACT.

THE purpose of this article is to state the legal meaning of the Sherman Anti-Trust Act as laid down by the Supreme Court of the United States, and then in the light of that meaning to consider briefly the possible future development of the law, whether by further judicial interpretation or by legislation.

The vital words of the Anti-Trust Act are found in the first two sections and are as follows:

"SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal. [Such acts are made criminal and penalties are provided.]

"SECTION 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations shall be deemed guilty of a misdemeanor and . . . [Penalties are provided]."

I.

The first fact to be noted is that the words quoted above have meant very different things to different individuals. They signified one thing to the framers of the law;[1] another to the judges who composed the Supreme Court in 1897;[2] still another to the judges who formed the Court in 1904.[3] Moreover, in eight out of

[1] "Mr. Sherman's bill found little favor with the Senate. It was referred to the Judiciary Committee, of which I was a member. I drew as an amendment the present bill, which I presented to the committee. There was a good deal of opposition to it in the committee. Nearly every member had a plan of his own. But at last the committee came to my view and reported the law of 1890. . . . It was expected that the court, in administering that law, would confine its operation to cases which are contrary to the policy of the law, treating the words 'agreements in restraint of trade' as having a technical meaning, such as they are supposed to have in England. The Supreme Court of the United States went in this particular farther than was expected." — *Autobiography of Seventy Years*, George F. Hoar, Vol. II, p. 364.

[2] United States *v.* Trans-Missouri Freight Association, 166 U. S. 290.

[3] Northern Securities Co. *v.* United States, 193 U. S. 197.

the ten leading cases in which this statute has been before the Supreme Court its words have meant one thing to some members of the court and another to other members. This difference of opinion shows clearly that the Anti-Trust Act standing by itself has no precise and easily ascertained meaning. Nearly all of the cases on the statute might have been decided the other way without furnishing clear ground for criticism. Manifestly the interpretation of the Act has been peculiarly a case of judicial legislation. The existing law as to restraints of interstate trade and commerce and the monopoly of the same is judge-made law, and is to be found only in the decisions of the Supreme Court.[1]

The cases are as follows:

1. Jan. 21, 1895 *United States* v. *E. C. Knight Company*, 156 U. S. 1.
2. March 22, 1897 *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290.
3. Oct. 24, 1898 *United States* v. *Joint Traffic Association*, 171 U. S. 505.
4. Oct. 24, 1898 *Hopkins* v. *United States*, 171 U. S. 578.
5. Oct. 24, 1898 *Anderson* v. *United States*, 171 U. S. 604.
6. Dec. 4, 1899 *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 21.
7. Feb. 23, 1904 *Montague* v. *Lowry*, 193 U. S. 38.
8. March 14, 1904 *Northern Securities Co.* v. *United States*, 193 U. S. 197.
9. Jan. 30, 1905 *Swift* v. *United States*, 196 U. S. 375.
10. March 6, 1905 *Harriman* v. *Northern Securities Co.*, 197 U. S. 244.
11. May 8, 1905 *Board of Trade of Chicago* v. *Christie Grain & Stock Co.*, 198 U. S. 236.
12. Feb. 3, 1908 *Loewe* v. *Lawlor*, 208 U. S. 274.
13. Feb. 1, 1909 *Continental Wall Paper Co.* v. *Voight & Sons*, 212 U. S. 227.
14. April 26, 1909 *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347.

[1] "As between the legislative and judicial organs of a society, it is the judicial which has the last say as to what is and what is not law in a community. To quote a third time the words of Bishop Hoadley: 'Nay, whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver to all intents and purposes, and not the person who first wrote or spoke them.'" — *John C. Gray, The Nature and Sources of the Law*, p. 369.

The whole existing authoritative meaning of the Anti-Trust Act is to be found in these decisions. To state the facts of the cases and the principles, as laid down by the majority of the court, on which they were decided, is necessary to ascertain the law. Three of the cases in the above list are, for the present purpose, of trifling importance, and may be disposed of in a few words.

The *Board of Trade* case held that contracts under which the Board of Trade furnished telegraph companies with its quotations which it could refrain from communicating at all, on condition that they would be distributed only to persons in contractual relations with and approved by the Board, and not to what are known as bucket-shops, were not void at common law or under the Act. In *Loewe* v. *Lawlor* a combination of trade unionists involving a widely extended boycott was held illegal. The case is important only as giving a broad meaning to the words "interstate commerce." In the *United Fruit Co.* case it was held that the prohibitions of the Act do not extend to things done in foreign countries, even though done by citizens of the United States and injuriously affecting other citizens of the United States. The remaining cases must be dealt with in greater detail.

The Knight Case.[1] The American Sugar Refining Company bought, in exchange for its own shares, all the stock of four Pennsylvania corporations engaged in the business of refining sugar. At the time of the purchase these four companies were in active competition with each other and with the American Sugar Company. Of the sugar refined and sold in the United States about thirty-three per cent came from the four Pennsylvania companies before they sold out; afterwards about ninety per cent came from the American company. The charter of this company empowered it to sell sugar as well as to refine it.

It was held that while the transaction constituted a successful attempt to monopolize the manufacture of sugar, it affected interstate commerce only indirectly if at all, and was therefore not covered by the Anti-Trust Act.

Fuller, C. J., delivered the opinion, in the course of which he said:

"That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state." P. 12.

[1] 156 U. S. 1.

"Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it and affects it only incidentally and indirectly. Commerce succeeds to manufacture and is not part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce." P. 12.

"The contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations." P. 17.

The above sums up the reasoning by which the transaction was declared to be not directly in restraint of interstate trade. Upon a point which in later cases became the main issue, the court said:

"The subject matter of the sale was shares of manufacturing stock, and the relief sought was the surrender of property which had already passed and the suppression of the alleged monopoly in manufacture by the restoration of the *status quo* before the transfers; yet the act of Congress only authorized the Circuit Courts to proceed by way of preventing and restraining violations of the act in respect of contracts, combinations, or conspiracies in restraint of interstate or international trade or commerce." P. 17.

Field, Gray, Brewer, Brown, Shiras, Jackson, and White, JJ., concurred. Harlan, J., delivered a vigorous dissenting opinion, in the course of which he made the following striking remarks:

"It is said that manufacture precedes commerce and is not part of it. But it is equally true that when manufacture ends, that which has been manufactured becomes a subject of commerce; that buying and selling succeed manufacture, come into existence after the process of manufacture is completed, precede transportation and are as much commercial intercourse, where articles are bought to be carried from one state to another, as is the manual transportation of such articles after they have been so purchased." P. 35.

"While the opinion of the court in this case does not declare the Act of 1890 to be unconstitutional, it defeats the main object for which it was passed. For it is, in effect, held that the statute would be uncon-

stitutional if interpreted as embracing such unlawful restraints upon the purchasing of goods in one state to be carried into another state as necessarily arise from the *existence* of combinations formed for the purpose and with the effect, not only of monopolizing the ownership of all such goods in every part of the country, but of controlling the price for them in all the states." P. 42.

"Now the *mere existence* of a combination having such an object and possessing such extraordinary power is itself, under settled principles of law, — there being no adjudged case to the contrary in this country, — a direct restraint of trade in the article for the control of the sales of which in this country that corporation was organized." P. 44.

The Trans-Missouri Freight Case.[1] On March 15, 1889, fifteen competing railroad companies entered into an agreement the preamble of which was:

"For the purpose of mutual protection by establishing and maintaining reasonable rates, rules and regulations on all freight traffic, both through and local, the subscribers do hereby form an association, and agree to be governed by the following provisions."

Then follow articles which provide for the election of a chairman, a representative of each company, a committee to establish rules, rates and regulations, and monthly meetings. Violations of the agreement were to be punished by majority vote of managers, each fine not to exceed $100.

On January 6, 1892, the United States instituted proceedings by a bill in equity. The prayer was that the Association be dissolved and that the defendants be each restrained from further agreeing, etc., as to rates.

It was held (1) that the Anti-Trust Act was not inconsistent with the Interstate Commerce Act of 1887 and that both statutes were law; (2) that the Anti-Trust Act applied to railroads; (3) that even reasonable contracts by railroads restraining interstate trade were forbidden by the Act; (4) that the contract or transaction before the court did restrain interstate trade directly though reasonably.

Peckham, J., delivered the opinion. He apparently had some difficulty in bringing railroads within the Act, but once he had done so, he implied that they were rather *more* subject to the Act than ordinary business enterprises. In the course of the opinion he said:

[1] 166 U. S. 290.

"The language of the Act includes *every* contract, combination, . . ." P. 312.

"Is it confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include what the language of the Act plainly and in terms covers, all contracts of that nature?" P. 327.

He adopted the latter construction and denied that the words "contract in restraint of trade" have legally a technical meaning signifying "in unreasonable restraint of trade." The phrase was held to cover all contracts which as a matter of fact restrain trade, though it was agreed that at common law only such as are unreasonable are invalid. Perhaps the most remarkable part of the opinion is the *dicta* concerning the evils of combinations of capital. He said:

"It is wholly different, however, when such changes are effected by combinations of capital, whose purpose in combining is to control the production or manufacture of any particular article in the market, and by such control dictate the price at which the article shall be sold, the effect being to drive out of business all the small dealers in the commodity and to render the public subject to the decision of the combination as to what price shall be paid for the article. In this light it is not material that the price of an article may be lowered. It is in the power of the combination to raise it, and the result in any event is unfortunate for the country by depriving it of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein. Whether they be able to find other avenues to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others. Nor is it for the substantial interests of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital." P. 323.

Fuller, C. J., Harlan, Brewer, and Brown, JJ., concurred.

White, J., with whom Field, Gray, and Shiras, JJ., concurred, delivered a dissenting opinion, taking the ground (1) that the Act

did not apply to railroads; (2) that if it did, the only sensible construction was that the words "contracts in restraint of trade" should be given their technical meaning signifying unreasonable restraint. In the course of his opinion he said:

"I commence, then, with these two conceded propositions, one of law and the other of fact, first, that only such contracts as unreasonably restrain trade are violative of the general law, and second that the particular contract here under consideration is reasonable, and therefore not unlawful if the general principles of law are to be applied to it." P. 344.

Joint Traffic Association Case.[1] This case represented an attempt to secure a reversal of the Trans-Missouri case, although counsel for the railroads claimed the two cases were not precisely alike. Thirty-one railroad companies had formed an association. The affairs of the association were to be managed by several boards, and the association had jurisdiction over all competitive traffic, with certain exceptions, which passed through certain places and such other places as might thereafter be designated by the managers. It was provided that the powers conferred upon the managers should be so construed and exercised as not to involve violation of the Interstate Commerce Act, and that the managers should coöperate with the Interstate Commerce Commission to secure stability and uniformity in rates, fares, and charges.

The managers were charged with the duty of securing to each company equitable proportions of the competitive traffic so far as this could be legally done. Joint freight and passenger agencies might be organized. Agencies for soliciting passengers or freight were not to be maintained by the separate companies except with the approval of the managers. Violations of the agreement were to be subject to fine of not over $5,000. The agreement was to take effect January 1, 1896, and continue five years.

A bill was filed by the United States for the purpose of having the agreement declared illegal and its further execution enjoined.

It was held (1) that the facts were not to be distinguished from those in the Trans-Missouri case; (2) that the decision in the Trans-Missouri case was right, and the same was affirmed; (3) that the Fifth Amendment of the Constitution providing that "No person shall be . . . deprived of life, liberty, or property without due pro-

[1] 171 U. S. 505.

cess of law," did not have the effect of rendering unconstitutional the Anti-Trust Act as construed by the court.[1]

The opinion was delivered by Peckham, J. He agreed with counsel that competition and commerce are not identical.

On the constitutional question he agreed that "liberty" includes the right to make proper contracts, but stated that the question was whether under the interstate commerce clause of the Constitution Congress had power to declare illegal, contracts like the one before the court. He held that it had. In the course of the opinion he said:

"It was considered in the other case that the rates actually fixed upon were reasonable, while the rates fixed upon in this case are also admitted to be reasonable." P. 565.

"The agreement affects interstate commerce by destroying competition and by maintaining rates above what competition might produce. If it did not do that, its existence would be useless, and it would soon be rescinded or abandoned." P. 569.

In reference to the contention of counsel that the Act as construed would cover practically all commercial activities, he said:

"Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade." P. 567.

"The effect upon interstate commerce must not be indirect or incidental only." P. 568.

"To suppose, as is assumed by counsel, that the effect of the decision in the Trans-Missouri case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this court." P. 568.

Fuller, C. J., Harlan, Brewer, and Brown, JJ., concurred. Gray, Shiras, and White, JJ., dissented but delivered no opinion. McKenna, J., took no part in the decision.

The Hopkins Case.[2] The defendants in this case were commission

[1] This constitutional question was not argued in the Trans-Missouri case.

[2] 171 U. S. 578.

merchants, members of a voluntary unincorporated association known as the Kansas City Live Stock Exchange. The Exchange admitted to membership any reputable person who was willing to be bound by its rules. The association itself did no business. The members received, as commission merchants, at the Kansas City stockyards, which was an open market owned by a separate corporation, large numbers of cattle, hogs, and sheep shipped from many of the western states, and sold them to various packing houses and persons of other states. The rules of the Exchange provided a scale of rates; prohibited the employment of more than three solicitors; and forbade members to send prepaid telegrams except to actual shippers or persons desiring to make purchases. There was competition among the members with one another, but members refused to deal with non-members. The Kansas City stockyards were freely used by non-members of the Exchange.

The United States filed its bill for the purpose of obtaining a dissolution of the Exchange and an injunction forbidding its members to enter into or continue any combination of like character.

It was held that the transaction was not within the Anti-Trust Act because the defendants were not engaged in interstate commerce, and their agreements did not restrain such commerce, and affected it only in a negligible degree. Peckham, J., delivered the opinion. The basis of the decision is expressed in the following words:

> "On the contrary, we regard the services as collateral to such commerce and in the nature of a local aid or facility provided for the cattle owner towards the accomplishment of his purpose to sell them; and an agreement among those who render the services relating to the terms upon which they will render them is not a contract in restraint of interstate trade or commerce." P. 588.

The reasoning of the opinion as to the by-laws forbidding the sending of telegrams and limiting the number of solicitors to be employed is not quite convincing. It would seem that these might have been held to be contracts restraining interstate trade if they had stood alone. The court considered them as merely incidental to a business which was not interstate commerce. Whether the refusal to transact intrastate business with non-members was justifiable was not pertinent to the issue and the court declined to consider it. In the course of the opinion Peckham, J., said:

"There must be some direct and immediate effect upon interstate commerce in order to come within the act." P. 592.

"The act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce and possibly to restrain it. We have no idea that the act covers or was intended to cover such kinds of agreements." P. 600.

Fuller, C. J., Gray, Brewer, Brown, Shiras, and White, JJ., concurred.

Harlan, J., dissented but delivered no opinion. McKenna, J., took no part in the decision of the case.

The Anderson Case.[1] The defendants in this case were members of a voluntary unincorporated association known as the Traders' Live Stock Exchange. They were not commission merchants, but themselves bought, sold, and speculated in cattle. They were what was known as "yard traders" and did business at the Kansas City stockyards, the same public market that appeared in the Hopkins case. The rules and by-laws of the Exchange forbade members to deal with yard traders who were not members, or with commission merchants who dealt with such yard traders. The Exchange did no business itself, and its members competed with one another and with such outside purchasers and sellers as were not yard traders; that is, with representatives of packing houses and others who bought to keep. Any reputable yard trader who was willing to be bound by its rules could join the Exchange.

It was held that the agreements as evidenced by the rules of the Exchange were not in direct restraint of interstate commerce and therefore not within the Act. Peckham, J., delivered the opinion, in the course of which he said:

"In the view we take of this case we are not called upon to decide whether the defendants are or are not engaged in interstate commerce, because if it be conceded they are so engaged, the agreement as evidenced by the by-laws is not one in restraint of that trade, nor is there any combination to monopolize or attempt to monopolize such trade within the meaning of the act." P. 615.

"There is no feature of monopoly in the whole transaction." P. 614.

[1] 171 U. S. 604.

The court agreed that the Exchange intended by its rules to compel all yard traders to join it, but said if this affected interstate trade at all it was only "in the most roundabout and indirect manner." Fuller, C. J., Gray, Brewer, Brown, Shiras, and White, JJ., concurred. Harlan, J., dissented but delivered no opinion. McKenna, J., took no part in the decision.

The Addyston Case.[1] The six defendant corporations were engaged in the manufacture and sale of iron pipe; one of them was located in Ohio, one in Kentucky, two in Alabama, and two in Tennessee. On December 28, 1894, they entered into an agreement which, as altered by some important changes adopted May 27, 1895, was in effect as follows: A representative board was appointed to which all inquiries for pipe were referred. This board fixed the price at which the pipe should be sold, and then the order was disposed of at an auction pool to that one of the six defendants which bid most for it. A quotation from the minutes of the board shows the precise method in vogue:

"It was moved to sell the 519 pieces of 20″ pipe from Omaha, Neb., for $23.40 delivered. Carried. It was moved that Anniston participate in the bonus and the job be sold over the table. Carried. Pursuant to the motion, the 519 pieces of 20″ pipe for Omaha was sold to Bessemer at a premium of $8."

In addition each defendant had reserved to itself certain cities where it alone could do business. At public lettings those defendants who were not to have the contract put in bids as high as the selected bidder requested. The territory covered by the agreement comprised about thirty states and territories and was known as "pay" territory. The six defendants did the great part of the business in the "pay" territory, although there was some competition. There was active competition in the "free" territory. The records and also admissions of certain defendants showed plainly that an object of the agreement was to raise prices.

It was held (1) that the power of Congress to regulate interstate commerce was not limited to protecting such commerce from the interference of state legislation, but included the right to declare invalid private contracts which restrained such commerce; (2) that the liberty clause of the Constitution must give way to the interstate

[1] 175 U. S. 21.

commerce clause; (3) that the combination was unreasonable and its result was unreasonable prices; (4) that the combination directly restrained interstate commerce; (5) that the Knight case did not govern the case at bar.

Peckham, J., delivered the opinion, in the course of which he said:

"Any combination among dealers in that kind of commodity, which in its direct and immediate effect forecloses all competition and enhances the purchase price for which such commodity would otherwise be delivered at its destination in another state, would in our opinion be one in restraint of trade or commerce among the states, even though the article to be transported and delivered in another state were still taxable at its place of manufacture." P. 246.

Congress "may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce." P. 228.

Referring to the Fifth Amendment he said:

"The power of Congress over this subject seems to us much more important and necessary than the liberty of the citizen to enter into contracts of the nature above mentioned, free from the control of Congress, because," etc. P. 230.

The weak part of the opinion is the attempt to distinguish the Knight case. On this point the court said:

"The direct purpose of the combination in the Knight case was the control of the manufacture of sugar. There was no combination or agreement, in terms, regarding the future disposition of the manufactured article, nothing looking to a transaction in the nature of interstate commerce. The probable intention on the part of the manufacturer of the sugar to thereafter dispose of it by sending it to some market in another state, was held to be immaterial and not to alter the character of the combination." P. 240.

"It is almost needless to add that we do not hold that every private enterprise which may be carried on chiefly or in part by means of interstate shipments is therefore to be regarded as so related to interstate commerce as to come within the regulating power of Congress. Such enterprises may be of the same nature as the manufacturing of refined sugar in the Knight case — that is, the parties may be engaged as manufacturers of a commodity which they thereafter intend at some time to sell, and

possibly to sell in another state; but such sale as we have already held is an incident to and not the direct result of the manufacture, and so is not a regulation of or an illegal interference with interstate commerce. That principle is not affected by anything herein decided." P. 246.

Fuller, C. J., Harlan, Gray, Brewer, Brown, Shiras, White, and McKenna, JJ. (all the judges), concurred.

Montague v. *Lowry*.[1] This was an action brought under section 7 of the Anti-Trust Act. This section provides that any person injured in property or business by anything declared to be illegal in the Act may recover threefold damages. The plaintiffs were copartners, dealers in tiles, mantels, and grates. There was an unincorporated association, to which the defendants belonged, known as the Tile, Mantel, and Grate Association of California, the members of which were dealers living and doing business in California and manufacturers located in several of the eastern states. The by-laws of the Association provided among other things the following:

"ARTICLE III, SEC. 7. No dealer and active member of this association shall purchase, directly or indirectly, any tile or fireplace fixtures from any manufacturer or resident or traveling agent of any manufacturer not a member of this association, neither shall they sell or dispose of, directly or indirectly, any unset tile for less than list prices to any person or persons not a member of this association, under penalty of expulsion from the association.

"SEC. 8. Manufacturers of tile or fireplace fixtures or resident or traveling agents or manufacturers selling or disposing, directly or indirectly, their products or wares to any person or persons not members of the Tile, Mantel, and Grate Association of California, shall forfeit their membership in the association."

The plaintiffs were not members of the association, and had never asked nor been invited to join it. Their business was injured because they were unable to obtain tiles from the manufacturers at any price, and were obliged to pay the dealers the list price referred to in Article III, which was fifty per cent more than the price at which tiles were sold to members.

It was held that the association was an illegal combination in restraint of trade, and that the plaintiff could recover. Peckham, J., delivered the opinion, in the course of which he said:

[1] 193 U. S. 38.

"The purchase and sale of tiles between the manufacturers in one state and dealers therein in California was interstate commerce within the Addyston Pipe case." P. 47.

"The agreement, therefore, restrained trade, for it narrowed the market for the sale of tiles in California from the manufacturers and dealers therein in other states, so that they could only be sold to the members of the association, and it enhanced prices to the non-member. . . ." P. 45.

On the objection of the defense that the action of the dealers occurred wholly within the State of California he said:

"The whole agreement is to be construed as one piece. . . . The whole thing is so bound together that when looked at as a whole the sale of unset tiles ceases to be a mere transaction in the State of California and becomes part of a purpose which, when carried out, amounts to and is a contract or combination in restraint of interstate trade or commerce." P. 45.

Fuller, C. J., Harlan, Brewer, Brown, White, McKenna, Holmes, Day, JJ. (all the judges), concurred.

The Northern Securities Case.[1] On November 13, 1901, the Northern Securities Company was organized under the laws of New Jersey with a capital stock of $400,000,000. Its charter empowered the company, among other things, "To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of shares of the capital stock of any other corporation, corporations, association or associations of the State of New Jersey or of any other state, territory or country, and while owner of such stock to exercise all the rights, powers, and privileges of ownership, including the right to vote thereon."

The real object of the organization was that the Northern Securities Company should become the holder of the stock of the Great Northern and Northern Pacific Railroad Companies. These companies had in the past been in active competition. A struggle for the control of the latter company between Messrs. Morgan and Hill on one side and Mr. E. H. Harriman on the other was the direct and compelling reason for the formation of the Securities Company. Stockholders of the two companies were offered the right to exchange their stock for that of the Securities Company, or to sell their stock to that company. By one method or another the Securities Com-

[1] 193 U. S. 197.

pany acquired the title to substantially all of the stock of the Northern Pacific Company and to a majority of the stock of the Great Northern Company. In the neighborhood of $42,000,000 was expended by the Securities Company in the purchase of stock and the acquisition of Northern Pacific bonds, which it converted into stock of that company. There was no combination other than that resulting from this stock ownership; that is, there were no contracts or agreements of any kind between the Northern Pacific and Great Northern Companies.

It was held that the Northern Securities Company was a combination in restraint of interstate trade and illegal under the Anti-Trust Act. The opinion of the court was delivered by Harlan, J. He reviewed the previous decisions of the court and stated that they had established the following propositions:

That the Act is not limited to unreasonable restraints of trade, but embraces all direct restraints.

That railroads are embraced by the Act.

That private manufacturers and dealers are embraced by the Act.

That Congress has prescribed the rule of free competition among those engaged in interstate commerce.

That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promoting trade and commerce.

That to bring a combination within the Act it is not necessary to show that it results or will result in a total suppression of trade, but only that by its necessary operation it tends to restrain interstate trade or commerce and to deprive the public of the advantages that flow from free competition.

That the Act is constitutional.

With reference to the objection chiefly relied on by the defendants that there was no combination but only the acquisition and ownership of stock by a corporation legally organized and existing under state laws he said:

"There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a transaction, it was not, in fact, one of that kind. However that company may have acquired for itself any stock in the Great Northern and Northern Pacific Railway Companies, no matter how it obtained the means to do so, all the stock it held or acquired in

the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose . . . the actual nature of the transaction, which was only to organize the Northern Securities Company as a *holding* company in whose hands, not as a real purchaser or absolute owner, but simply as a custodian, were to be placed the stocks of the constituent companies — such custodian to represent the combination formed between the shareholders of the constituent companies, the direct and necessary effect of such combination being as already indicated, to restrain and monopolize interstate commerce by suppressing or . . . 'smothering' competition between the lines of two railway carriers." P. 353.

Brown, McKenna, and Day, JJ., concurred in the decision and opinion. Brewer, J., concurred in the decision but delivered an opinion in which he deplored the broad language used by the court. He felt that the prior cases holding certain combinations illegal should be sustained on the ground that the restraints in question were unreasonable; that the rule of law should be that reasonable restraints were not covered by the Act. As to the form of the combination in the case at bar he said:

"A corporation, while by fiction of law recognized for some purposes as a person, and for purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business. In this case it was a mere instrumentality by which separate railroad properties were combined under one control. That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock. The transfer of stock to the Securities Company was a mere incident, the manner in which the combination to destroy competition and thus unlawfully destroy trade was carried out." P. 362.

White, J., with whom Fuller, C. J., and Peckham, J., concurred, delivered a dissenting opinion. He also reviewed at length previous decisions of the court and states the following conclusion:

"Now, it is submitted, that the decided cases just reviewed demonstrate that the acquisition and ownership of stock in competing railroads, organized under state law, by several persons or by corporations, is not interstate commerce, and, therefore, not subject to the control of Congress." P. 390.

He further said:

"It is said, moreover, that the decision of this case does not involve the consequences above pointed out, since the only issue in this case is the right of the Northern Securities Company to acquire and own stock. The right of that company to do so, it is argued, is one thing; the power of individuals or corporations, when not merely organized to hold stock, an entirely different thing. My mind fails to seize the distinction." P. 371.

"True, the instrumentalities of interstate commerce are subject to the power to regulate commerce, and therefore such instrumentalities when employed in interstate commerce may be regulated by Congress as to their use in such commerce. But this is entirely distinct from the power to regulate the acquisition and ownership of such instrumentalities, and the many forms of contracts from which such ownership may arise. The same distinction exists between the two which obtains between the power of Congress to regulate the movement of property in the channels of interstate commerce and its want of authority to regulate the acquisition and ownership of the same property. This difference was pointed out in the cases which have been referred to, and the distinction between the two has been from the beginning the dividing line, demarking the power of the national government on the one hand and of the States on the other." P. 393.

"It has been decided by this court that, as the Anti-Trust Act forbids any restraint, it therefore embraces even reasonable contracts or agreements." P. 373.

Holmes, J., concurred in the main with White, J., but himself delivered a dissenting opinion. This opinion furnishes the clearest and best statement to be found in these cases of one possible and entirely tenable construction of the Act. In the course of the opinion he said:

"Much trouble is made by substituting other phrases assumed to be equivalent, which then are reasoned from as if they were in the act. The court below argued as if maintaining competition were the expressed object of the act. The act says nothing about competition. I stick to the exact words used. The words hit two classes of cases, and only two, — contracts in restraint of trade, and combinations or conspiracies in restraint of trade." P. 403.

"Contracts in restraint of trade, I repeat, were contracts with strangers to the contractor's business, and the trade restrained was the contractor's own." P. 404.

"Combinations or conspiracies in restraint of trade, on the other hand, were combinations to keep strangers to the agreement out of business. The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm and their supposed consequent effect upon the public at large. In other words, they were regarded as contrary to public policy because they monopolized or attempted to monopolize some portion of the trade or commerce of the realm." P. 404.

"A partnership is not a contract or combination in restraint of trade unless the well-known words are to be given a new meaning invented for the purposes of this act. It is true that the suppression of competition was referred to in United States *v.* Trans-Missouri Freight Association, 166 U. S. 290, but, as I have said, that was in connection with a contract with a stranger to the defendants' business, — a true contract in restraint of trade. To suppress competition in that way is one thing, to suppress it by fusion is another. The law, I repeat, says nothing about competition, and only prevents its suppression by contracts or combinations in restraint of trade, and such contracts or combinations derive their character as restraining trade from other features than the suppression of competition alone." P. 410.

"I repeat, that in my opinion there is no attempt to monopolize, and what, as I have said, in my judgment amounts to the same thing, that there is no combination in restraint of trade, until something is done with intent to exclude strangers to the combination from competing with it in some part of the business it carries on." P. 409.

Harriman v. *Northern Securities Co.*[1] is important only for the light it throws on the meaning of the Northern Securities case. The decision only went so far as to hold that the title to the stocks transferred to the Northern Securities Company had passed as between the parties; but the following statement of Fuller, C. J., is worth noting:

"Some of our number thought that as the Securities Company owned the stock the relief sought could not be granted, but the conclusion was that the possession of the power, which, if exercised, would prevent competition, brought the case within the statute no matter what the tenure of title was." P. 291.

The Packers' Case.[2] This was a bill brought by the United States against several corporations, firms, and individuals of different states.

[1] 197 U. S. 244.

[2] 196 U. S. 375.

The defendants were engaged in the business of buying livestock at stockyards in Chicago, Omaha, St. Joseph, East St. Louis, and St. Paul, slaughtering livestock in their plants in various states, and selling fresh meat to dealers and consumers and shipping the same throughout the country. The defendants together controlled about six-tenths of the whole trade in fresh meats, and but for the acts complained of, would have been in free competition with one another. The bill charged:

"A combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live-stock markets of the different states, to bid up prices for a few days in order to induce the cattle men to send their stock to the stockyards, to fix prices at which they will sell, and to that end to restrict shipments of meat when necessary, to establish a uniform rule of credit to dealers and to keep a black list, to make uniform and improper charges for cartage, and finally, to get less than lawful rates from the railroads to the exclusion of competitors." P. 394.

It was held that the combination was illegal under the Anti-Trust Act.

Holmes, J., delivered the opinion of the court, in the course of which he said:

"The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all we can say, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as parts of a single plan. The plan may make the parts unlawful." P. 396.

"Taking up the latter objection first, commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock-yards, and when this is a typical constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce." P. 398.

"The defendants cannot be ordered to compete, but they properly can be forbidden to give directions or make agreements not to compete." P. 400.

Fuller, C. J., Harlan, Brewer, Brown, White, Peckham, McKenna, and Day, JJ. (all the judges), concurred.

Wall Paper Case.[1] The Continental Wall Paper Company, a New York corporation, brought suit against Voight & Sons, an Ohio corporation, to recover $56,762.10, being balance due on account of merchandise sold and delivered to the defendant. The defense was that the plaintiff was an illegal combination under the Act. Among the facts set out in the answer were the following: The plaintiff corporation was formed to act as selling agent of various persons and corporations who produced upwards of ninety-eight per cent of all wall paper sold and manufactured in the United States. Each firm or corporation which joined in the transaction signed a contract with the Continental Company, agreeing to sell to that company its entire product at certain prices set out in a schedule called "A." They also agreed that the Continental Company should have the right to audit their books. The Continental Company, by refusing to furnish wall paper to such persons or corporations as would not accede to its request, compelled all dealers, both jobbers and wholesalers in wall paper, to sign an agreement that they would buy from no one but members of the combination, and at prices fixed in a schedule called "B." The jobbers were compelled to sign an additional agreement that they would not sell to dealers other than jobbers at prices less than those set out in a schedule called "C." One of the results of the combination was that the price of wall paper very much increased. The defendant had signed one of these agreements, and the merchandise in question was bought at the schedule price. The plaintiffs demurred to this answer.

It was held that the combination was illegal under the Anti-Trust Act, and that the sale in question being part of the illegal scheme the plaintiff was not entitled to the aid of the court. Harlan, J., delivered the opinion of the court, adopting the language of Lurton, J., in the Circuit Court of Appeals.

"The conspiring mills were situated in many states. The consumers [of wall paper] embraced the whole citizenship of the United States. The jobbers and wholesalers who were to be coerced into contracts to buy their entire demands from the Continental Wall Paper Company or be driven out of business, were in every state. Before the combination each of the combining companies was engaged in both state and interstate com-

[1] 212 U. S. 227.

merce. The freedom of each, with respect to prices and terms, was restrained by the agreement and interstate commerce directly affected thereby, as well as by the enhancement of prices which resulted. A more complete monopoly in an article of universal use has probably never been brought about. It may be that the wit of man may yet devise a more complete scheme to accomplish the stifling of competition. But none of the shifts resorted to for suppressing freedom of commerce and securing undue prices, shown by the reported cases, is half so complete in its details." P. 256.

Fuller, C. J., McKenna, Day, and Moody, JJ., concurred.

Holmes, J., with whom Brewer, White, and Peckham, JJ., concurred, delivered a dissenting opinion. He agreed that the combination was illegal under the Act, but thought that the particular sale in question should stand on its own merits and not as part of the illegal scheme. Brewer, J., also delivered a dissenting opinion taking the ground that the remedies prescribed by the Anti-Trust Act were exclusive.

The decisions soon to be expected in the American Tobacco Company case and the Standard Oil case will afford further enlightenment on the Anti-Trust Act, particularly as regards corporate combinations.

II.

It is now proposed to state the definitely binding rules of law to be drawn from these decisions. As a general summary the following is ventured: Any combination which directly restrains interstate trade is illegal. Trade is restrained by the ending or limiting of competition among the members of the combination as well as when the business of others is injured; it is not necessary that competition of outsiders be destroyed or affected. The restraint need not be unreasonable. The actual effect of the transaction on prices is not a determining factor; it is sufficient if a power to raise prices is acquired or increased. This power need not be broad enough to cover the whole country; indeed, its possible exercise may embrace only comparatively narrow limits. A "direct" restraint imports not only that the restraint be the proximate result of the combination, but also in some degree substantial. Whether the court will hold any given restraint trifling and negligible or substantial and "direct," there is no rule to determine. A holding company is a combination.

The above seems a broad statement, but it is fairly justified by the

decisions. The minority opinions in the Trans-Missouri case and in the Northern Securities case attribute an even more extended meaning to the decisions of the court. The fact that the majority opinions in several of the cases contain statements disclaiming any intention of covering so wide a field as the principles laid down seem to embrace, does not alter the effect of the actual decisions.

Something by way of definition and comment must be added to give the above summary its complete meaning.

Interstate commerce includes both transportation between states and also the purchase and sale of commodities that are expressly intended to be carried from one state to another, or which, from the inevitable logic of facts, must be taken to be so intended. The Knight case, for all practical purposes, must be held to be overruled by the Addyston case. It is impossible for the average mind to distinguish the two. To say that the combination in the Knight case restrained only manufacture is ignoring not the "probable intention," as Judge Peckham called it, on the part of the manufacturer, but the inevitable result of the manufacture by a combination of over ninety per cent of the sugar refined in the whole country.

As there is no rule as to what constitutes a direct restraint, each case stands on its own basis. The Anderson case furnishes an example of a restraint held indirect. Looking at the whole transaction, the court could properly say that the Traders' Live Stock Exchange was not a combination in restraint of trade, but a combination to carry on a certain business in a convenient and orderly manner. If the restraint is direct, the fact that it is reasonable is of no avail. The decisions in the Trans-Missouri Freight case and in the Joint Traffic case expressly decide that even a reasonable restraint of interstate commerce is invalid under the Act. In both the majority and minority opinions in the former case, the reasonableness of the restraint in question was expressly accepted as a fact. In the Northern Securities case this principle, laid down in the Freight cases, was recognized as law by all the judges with the exception of Brewer.

The Northern Securities case stands squarely for the proposition that a combination effected by means of a holding company formed for the purpose of exchanging its stock for the stock of the companies combined is illegal under the Act. The court looked through the form and discerned the combination. The case does not in terms decide that it is invalid for one corporation *bona fide* to buy out another

by acquisition of its stock. It leaves untouched the further question of the legality of a combination which acquires title to the tangible property of the companies combined. The reasoning of the decision, however, seems to be broad enough to cover any corporate combination when combination is the vital feature of the transaction.

Whether a combination depends for its success on the real economic values lying in the fact of combination or merely on its power to control the situation is, under the law, immaterial. The best possible trust, if it represents a combination, is illegal.

In concluding this comment on the law as actually laid down by the court one important fact is to be noted. The second section of the Act prohibiting monopolies and attempts to monopolize has received no adequate interpretation, and practically no interpretation at all. It is hardly mentioned except in the Northern Securities case. No combination has been held to fall under the second section unless it was first declared to be illegal under the first section. In the future it may be possible for the court to hold a given corporate combination not included under section 1 because not technically a combination at all; at the same time deciding it to be a monopoly for reasons the nature of which existing decisions in no way indicate. This possibility furnishes the only discernible way in which new construction of the Act may be attained without additional legislation.

III.

On the principles as laid down above it appears not only possible but probable that every great combination in the country is liable to prosecution and dissolution under the Anti-Trust Act. This seems fairly certain as to those combinations maintained by means of holding companies, and may include those which hold by direct title the plants of the companies combined.

Clearly as this conclusion follows from the decisions discussed, it involves such tremendous practical consequences as to be accepted only with extreme reluctance. Moreover the fact itself is extraordinary. How business and law have got into what it is little exaggeration to call an *impasse*, deserves an attempt at explanation. For more than thirty years the compelling force in the business evolution of the country has been a tendency of separate interests to combine. Practically co-extensive in point of time has been an ever increasing

hostility to great combinations of capital on the part of the general public. This persistent feeling of antagonism against the trusts, in 1890 took definite form in the enactment of the Anti-Trust Act. The statute was a piece of trial legislation, a shot into the air; but it was a shot of sweepingly wide range. Unless given a technical meaning, the words of the Act are broad and undefined. It was open to the court to give them an exceedingly comprehensive meaning. By a narrow construction the Act could be limited to such transactions as at common law would fall under the head of technical contracts or combinations in restraint of trade; by a broader construction it could be held to cover all the looser forms of combinations; by a still broader construction it could be made to prohibit anything which was in effect and fact a combination whatever its form. The determination that great combinations should not be allowed to exist, which, to borrow an expression from Holmes, J., "somehow breathes from the pores of the Act," could through interpretation of the court become law.

The best and clearest exposition of the Act, as prohibiting all looser forms of combination, is to be found in the dissenting opinion of Holmes, J., in the Northern Securities case. Its effect, as thus construed, is to drive combinations into the corporate form; a form in which they can be dealt with definitely.

As a matter of fact this was for many years the chief practical result of the Anti-Trust Act. Until the decision in the Northern Securities case it was the generally accepted belief among lawyers that the construction adopted by Holmes, J., in that case was law; in other words, that a combination in the form of a corporation was valid under the Act. This belief rested on the well-known principle of general law that a corporation is an entity. The process of looking through the corporate form and dealing with what that form shelters is of recent growth. Moreover, with one notable exception every case under the Act was concerned with a loose combination in which independent identities were maintained. The exception was the Knight case, the first great case under the statute, which dealt with a combination in corporate form. There it was held that the combination in question was not covered by the Act. It is interesting to note, however, certain facts connected with these decisions which might have lessened the confidence of lawyers as to the validity of the corporate combination. The decision in the Knight case was rested wholly on

the point of interstate commerce. There is only a *dictum* by Fuller, C. J., expressing a doubt as to the possibility of remedy in the case of a real fusion. In later cases, where attempts were made to distinguish the Knight case no stress was laid on the fact that the combination in that case was in corporate form.

Whether the generally accepted belief was justified or not, there is no question as to what actually occurred. Many, if not most, of the great corporate combinations in the country were formed between the time of the decision in the Knight case and that in the Northern Securities case. Combination by agreement ceased. Combination by fusion took its place. Meanwhile hostility to the trusts persisted and increased. Public opinion was opposed to combinations in their looser forms. It was equally antagonistic to them in the corporate form. Public opinion has unquestionably been reflected in the decisions of the Supreme Court. Through the decision in the Northern Securities case the wide view of the Act also became law. The Northern Securities case struck a severe blow at the corporate combination. It marked a new era. In view of the fact that combinations to-day, practically without exception, take the corporate form, the importance of this decision transcends that of all the other cases put together. Nevertheless, the old belief persisted to a greater or less extent. What was of more practical importance, the government showed no disposition to enforce the law as thus newly construed against the many corporations which might fall within its prohibitions. The Attorney-General of the United States is reported to have said soon after that decision, "The government will not run amuck." It has not done so. The tremendous significance of the American Tobacco Company and Standard Oil Company decisions in the United States Circuit Courts lies in the message conveyed that the law is to be enforced rather than in any addition to existing law.

IV.

It can hardly be endured that the law remain in its present state. The logic of events is certain to bring about a change either by continued judicial construction or by legislation. The enlightened and modern view of the trust problem is that it is an economic question. The changed social relations objected to by Peckham, J., in the Trans-Missouri Freight case are now accepted by most persons, in the same

spirit that changes due to the introduction of machinery were accepted, — as inevitable. The remediable evils are economic evils. The principle of combination is inherently sound. It is based on the familiar maxim "In union there is strength." Properly applied, the principle means progressive commercial methods and results in better service and lower prices. The real evil of the trusts, it is now generally believed, consists merely in monopoly control; that is, in the power of a combination to do as it pleases. This is by no means a necessary accompaniment to the fact of combination. Nor is the dissolution of existing combinations or the prohibition of new ones required to eradicate or prevent this evil.

The law must strike not at the principle of combination but at *monopoly* control. How the evil of monopoly control will be dealt with eventually it is not pretended to prophesy. Public service companies and ordinary industrial corporations stand on wholly different grounds and must be treated differently. The following suggestions apply only to the latter. The obvious and direct method of proceeding, the method which, it is generally believed, should be first tried, is to render great combinations fairly susceptible to competition. This does not mean that fictitious competition should be instigated or sustained. It means only that actual and *bonâ fide* competition should be given opportunity to enter the field, and that when it has done so it should be fought only by fair and proper methods. To this end adequate publicity should be given to corporate affairs, and combinations should be forbidden to fight competitors by lowering the selling price in one part of the country to kill off local competition, while maintaining prices elsewhere; by refusing to deal with persons who are competing or intending to compete or who refuse to accept restrictive terms; and generally by discriminations of one sort or another. Under a law with such provisions a combination would be fairly subject to competition actual or potential. If subject to such competition the remediable evils of the trusts would disappear. Competition, whether it be actual or potential, and monopoly control are a contradiction in terms and the two cannot exist together.

In preparing the way for the required change, the Anti-Trust Act has performed a tremendously valuable service. There still remains work for it to do. The Act, in so far as it covers loose combinations, is a piece of final and complete legislation. The looser forms of combination cannot be definitely handled; the cor-

porate form can be. Section 2 of the Act, by judicial construction which shall lay down definite rules, may become a useful piece of legislation prohibiting vicious attempts to acquire a monopoly, whether by combination or otherwise. Section 1, however, in so far as by interpretation of the Supreme Court it renders illegal corporate combinations which merely terminate competition among the combining members, is not enlightened legislation. As so construed it can be useful, if at all, only as a club to compel voluntary acceptance of legislation which shall be enlightened, hardly a dignified function for a law to be called upon to perform, but perhaps, as a practical matter, necessary. Obviously judicial construction can hardly be expected to cover the ground wholly and finally, even with the freest use of that convenient fiction, "what Congress must be held to have intended."

The required end can be attained only by legislation of uniform application. A national corporation law, such as is recommended by the President, seems, from a practical point of view, the only method of accomplishing the desired result. If such a law is held unconstitutional, it would seem to be easier to secure an amendment to the Constitution than to obtain uniform legislation from the forty-six states.

If the broad view of the Anti-Trust Act is extended to combinations formed by acquisition of the tangible property of the companies combined, it should be sufficient if the law provides for voluntary incorporation. Combinations liable to dissolution under the Act would of their own volition incorporate under the national law and submit to its provisions. If not so extended, or if the principle of the Northern Securities case is limited by future decisions, compulsory incorporation would be necessary.

To discuss in detail the law submitted to Congress, which has probably not yet taken its final shape, is beyond the scope of this article. To accomplish its purpose the Act finally passed must contain certain provisions. It must frankly and definitely exempt combinations incorporated under it from the operation of Section 1 of the Anti-Trust Act as construed by the Supreme Court. It should require adequate publicity of corporate affairs; and it should forbid cut-throat competition and other sorts of discriminations undertaken for the purpose of destroying competition.

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